84998-6
40247-5-II
NO. ~~83037-1~~

(from Pierce County Cause No. 08-2-09228-9)

SUPREME COURT
OF THE STATE OF WASHINGTON

ANGELA ERDMAN,

Plaintiff/Appellant,

v.

CHAPEL HILL PRESBYTERIAN CHURCH; MARK J. TOONE, individually; and the marital community of MARK J. TOONE and JANE DOE TOONE,

Defendants/Respondents.

On Appeal from Pierce County Superior Court

REPLY BRIEF OF APPELLANT

Robin Williams Phillips, WSBA No. 17947
Sean V. Small, WSBA No. 37018
Attorneys for Plaintiff/Appellant
Lasher Holzapfel Sperry & Ebberson, PLLC
2600 Two Union Square
601 Union Street
Seattle WA 98101-4000

TABLE OF CONTENTS

I. REPLY 1

A. THE TRIAL COURT WAS NOT BOUND BY THE ACTIONS OF THE PRESBYTERY 2

1. *Resolution of Mrs. Erdman's Claims do Not Require the Interpretation of Church Doctrine* 2
2. *The Form 26 Document and the Presbytery's Findings do Not form the Basis of Mrs. Erdman's Causes of Action* 4
3. *Respondents' Reliance on Elvig is Misplaced* 6

B. THE MINISTERIAL EXCEPTION IS NOT APPLICABLE HERE 8

1. *The Trial Court's Determination on Summary Judgment did Not Include Analysis of the Ministerial Exception* 8
2. *The Facts in this Case Support a Finding that the Ministerial Exception Does Not Apply* 9

C. THE WLAD IS UNCONSTITUTIONAL 17

1. *Mrs. Erdman's Constitutional Challenge of RCW 49.60.040(3) on the basis of Article I, § 12 is an Issue of First Impression* 17
2. *Strict Scrutiny Applies* 19
3. *The Discriminatory Section of the WLAD is Severable* 21
4. *Notice to the Attorney General was Not Required* 21

D. IT WAS AN ERROR FOR THE TRIAL COURT TO RELY ON WITHHELD DOCUMENTS 22

E. MRS. ERDMAN SHOULD HAVE HAD THE OPPORTUNITY TO CONDUCT DISCOVERY 22

II. CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Bell v. Presbyterian Church, 126 F.3d 328 (4th Cir. 1997) 25
City of Tacoma v. Franciscan Foundation, 94 Wn. App. 663, 669, 972 P.2d 566 (1999) 18
Duranceau v. City of Tacoma, 27 Wn. App. 777, 620 P.2d 533 (1980) 20
E.E.O.C. v. Catholic University of America, 83 F.3d 455(C.A.D.C. 1996) 24
EEOC v. Southwestern Baptist Seminary, 651 F.2d 277 (5th Cir. 1981) 12, 13
Eisenberg v. Fauer, 25 Misc.2d 98, 200 N.Y.S.2d 749 (1960) 12
Elvig v. Ackles, 123 Wn. App. 491, 496, 98 P.3d 524 (2004) ..... passim
Farnam v. CRISTA Ministries, 116 Wn.2d 659, 681, 807 P.2d 830 (1991) 18
Fontana v. Diocese of Yakima, 138 Wn. App. 421, 426-427- 157 P.3d 443 (2007) 14
Gates v. Seattle Archdiocese, 103 Wn. App. 160, 166-67, 10 P.3d 435 (2000) 3, 11, 12
Graff v. Allstate Ins. Co., 113 Wn. App. 799, 54 P.3d 1266 (2002) 9
Grant Cy. Fire Prot. Dist. v. Moses Lake, 150 Wn.2d 791, 813, 83 P.3d 419 (2004) 20
Leonard v. City of Spokane, 127 Wn.2d 194, 201, 897 P.2d 358 (1995) 21
MacDonald v. Grace Church Seattle, 457 F.3d 1079 (9th Cir. 2006) 18, 19
McClure v. Salvation Army, 460 F.2d 553, 558-59 (5th Cir. 1972) 11
Minker v. Baltimore Annual Conf. of United Methodist Church, 894 F.2d 1354, 1359-61 (D.C.Cir. 1990) 12
Mt. Hood Beverage Co. v. Constellation Brands, Inc., 149 Wn.2d 98, 118, 63 P.3d 779 (2003) 21
N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979) 24
Org. for Preserving Constitution of Zion Lutheran Church of Auburn v. Mason, 49 Wn. App. 441, 445, 743 P.2d 848 (1987) 3, 12
Presbytery of Seattle, Inc. v. Rohrbaugh, 79 Wn.2d 367, 485 P.2d 615 (1971), *cert. denied,* 405 U.S. 996, 92 S.Ct. 1246, 31 L.Ed.2d 465 (1972) 3
Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) 11, 12, 13, 14
Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360, 363 n. 3 (8th Cir. 1991) 12
Serbian Eastern Orthodox Diocese for the U.S. and Canada v. Milivojevich, 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976) 2, 23
Smith v. Riley, 424 So.2d 1166 (La.Ct.App. 1982) 12
Snedigar v. Hoddersen, 114 Wn.2d 153, 786 P.2d 781 (1990) 23
Southside Tabernacle v. Pentecostal Church of God, Pac. N.W. Dist., Inc., 32 Wn. App. 814, 817, 650 P.2d 231 (1982) 3
State v. Williams, 144 Wn.2d 197, 213, 26 P.3d 890 (2001) 21
Supreme Court of N.H. v. Piper, 470 U.S. 274, 280 n. 9, 285, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985) 20
Umberger v. Johns, 363 So.2d 63 (Fla.Dist.Ct.App. 1978) 12
Watson v. Jones, 80 U.S. 679, 20 L. Ed. 666, 13 Wall. 679 (1871) 2, 3, 5
Wilkerson v. Battiste, 393 So.2d 195 (La.Ct.App. 1980) 12

STATUTES

42 U.S.C. § 2000e-1 20
RCW 49.60.040(3) ..... passim
RCW 7.24.110 21
Washington Constitution Article I, § 12 17

OTHER AUTHORITY

Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Colum. L. Rev. 1514, 1545 (1979) 12
Amicus Brief of Presbyterian Church (USA) Synod of Alaska Northwest p.19 *available at* http://www.pcusa.org/acl/amicus/am49.pdf 8

I. REPLY

Exclusive of a religious organization's employment decision regarding its ministers, there can **never** be a legitimate basis for permitting the religious organization to discriminate, harass, or retaliate against an employee. In the same regard, a trial court's review of a lawsuit based on discrimination, harassment, and retaliation in the workplace does not involve the interpretation of Church doctrine or religious beliefs. No hieratical religious organization advocates discrimination, harassment, and/or retaliation in the workplace, so a trial court's review of issues related to the same would be the review of purely secular conduct.

Repeatedly, Respondents rely on case law that specifically involved a plaintiff that was a minister or a member of the clergy. This fact is clearly distinguishable in the instant case. Yet, Respondents seek to have this Court apply the "ministerial exception" even though the trial court specifically decided not to make this determination. That being said, a review of Mrs. Erdman's **primary work functions** will demonstrate that the exception does not apply in this case.

Basic principals of employee rights should not be set aside because that individual works for a religious organization. If a person is harassed, discriminated, or retaliated against he/she should have the right to seek the protections that this State provides.

Mrs. Erdman is requesting that this Court reestablish and provide guidance concerning the protections of the First Amendment. Both parties are relying on the same case law; however, a derogation of the concept set forth in Watson v. Jones has occurred.

Mrs. Erdman respectfully submits this Reply in support of her Appellate Brief, and requests that this Court remand and/or reverse the trial court's decisions on summary judgment and with respect to discovery. In addition, Mrs. Erdman requests that this Court strike the unconstitutional provision of the Washington Law Against Discrimination ("WLAD").

A. The Trial Court was Not Bound by the Actions of the Presbytery

1. Resolution of Mrs. Erdman's Claims do Not Require the Interpretation of Church Doctrine

The **dispositive question** in this case is whether resolution of Ms. Erdman's legal claims requires the secular court to interpret or weigh church doctrine. If not, the First Amendment **is not implicated** and neutral principles of law are properly applied to adjudicate the claim.[1]

Respondents primarily rely upon the Milivojevich and Elvig decisions, yet ignore the foundation and basis for these decisions. In Washington, civil courts **may adjudicate** church-related disputes if the

[1] *See* Serbian Eastern Orthodox Diocese for the U.S. and Canada v. Milivojevich, 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976).

dispute does not involve ecclesiastical or doctrinal issues.[2] The limitation placed on secular courts by the First Amendment **only** comes into play when the matter before the court raises a question of doctrine, ecclesiastical law, rule or custom, or church government that was previously decided by a hierarchical tribunal.[3]

Here, Respondents have failed to fully analyze the relevant case law to the facts in this case. Mrs. Erdman presented a detailed history of the development of the religious protections and the prodigy the case law analyzing the same; however, Respondents offered no response.

Respondents have stated the law, but this does not change the fact that the trial court failed to conduct any analysis as to whether Mrs. Erdman's causes of action raised questions of doctrine, ecclesiastical law, rule or custom, or church government. The record demonstrates that the trial court relied on the Elvig decision, but neglected to conduct the relevant inquiry in making its decision. As such, this case should be remanded.

---

[2] Elvig v. Ackles, 123 Wn. App. 491, 496, 98 P.3d 524 (2004); *see* Gates v. Seattle Archdiocese, 103 Wn. App. 160, 166-67, 10 P.3d 435 (2000); Org. for Preserving Constitution of Zion Lutheran Church of Auburn v. Mason, 49 Wn. App. 441, 445, 743 P.2d 848 (1987); and Southside Tabernacle v. Pentecostal Church of God, Pac. N.W. Dist., Inc., 32 Wn. App. 814, 817, 650 P.2d 231 (1982).

[3] *See* Watson v. Jones, 80 U.S. 679, 20 L. Ed. 666, 13 Wall. 679 (1871); Presbytery of Seattle, Inc. v. Rohrbaugh, 79 Wn.2d 367, 485 P.2d 615 (1971), *cert. denied,* 405 U.S. 996, 92 S.Ct. 1246, 31 L.Ed.2d 465 (1972).

2. *The Form 26 Document and the Presbytery's Findings do Not form the Basis of Mrs. Erdman's Causes of Action*

Respondents wrongly assert that the issues before the Presbytery of Olympia ("Presbytery") were the same as those before the trial court. Even more, Respondents appear to argue that Mrs. Erdman's causes of action are based on the Form 26 document she presented to the Presbytery – this is not the case. Respondents have sought to infuse the issues raised in the Form 26 document with the causes of action asserted in the underlying case; however, doing so ignores the facts and relief sought in each. A plain reading of the Form 26 and the Complaint highlights the significant differences.

The Form 26 document is **not** at issue in this case. No causes of action were asserted that relate to the Form 26, and equally significant, the Presbytery was not a party to this lawsuit. The trial court was not asked by Mrs. Erdman to make any determination pertaining to the document or the Presbytery's review of the same. Respondents make the awkward assertion that Mrs. Erdman's position is undermined "by the plain text of her Form 26 grievance."[4] Respondents have sought to frame Mrs. Erdman's claims as being based on the relief sought in the Form 26 document; however, this is a misstatement of the facts in this case. Mrs.

[4] *See* Respondents' Brief p. 31.

Erdman did not request the trial court to review and make a determination related to the Form 26.

The Form 26 grievance is separate and distinct from the causes of action asserted. Consistent with the role of the Presbytery, Ms. Erdman's Form 26 requested a finding that Toone had violated scripture. Respondents confirm this in their brief. Any determination made by the Presbytery would be limited by the very question put before it -- whether Toone violated scripture. Even more, Ms. Erdman only identified grievances against Toone in the Form 26 -- **not the Church**.

Ms. Erdman has asserted causes of action based on the hostile, retaliatory, and prejudicial work environment, willful withholding of wages, breach of contract and wrongful discharge. It is not necessary to interpret, let alone review, the Church's doctrine to adjudicate this matter, this includes the Form 26. In addition, this case can be distinguished from previous cases where the Presbytery and/or supervising hierarchical religious body was a party. This case does not require this Court to entangle itself in Presbyterian religious beliefs or doctrine.

Respondents are requesting that this Court provide a blanket exception to allow religious organization to discriminate. The case law interpreting Watson v. Jones,[5] has been distorted beyond recognition. The

[5] 80 U.S. 679, 20 L. Ed. 666, 13 Wall. 679 (Establishing doctrine of judicial abstention in matters which involved interpretation of religious law and doctrine).

First Amendment is **not** a pretextual shield to protect a religious organization's otherwise prohibited employment decisions. When liability is predicated on secular conduct and does not involve the interpretation of church doctrine or religious beliefs secular court should be able to proceed. A trial court must determine whether the conduct complained is secular in nature; however, the trial court in this matter failed to do so.

3. Respondents' Reliance on Elvig is Misplaced

The Elvig facts and decision are distinguishable from this case, and should not have formed the basis for dismissing Mrs. Erdman's causes of action. Respondents fail to differentiate between a court's determination to dismiss claims because (1) the application of the ministerial exception and (2) the causes of action asserted raise questions of ecclesiastical law, rule, or custom that was previously decided by a hierarchical tribunal. In all fairness to Respondents, the Elvig decision does not do a very good job at segregating these issues because both were at play in that case. The same facts are not present here, and relying too heavily upon Elvig distorts the issues before this Court.

The decision in Elvig is extremely limited, and not pertinent to the facts here. In Elvig, the court specifically stated:

> "Our ruling is a narrow one based on the court's inability to question or interpret the Presbyterian Church's self-governance. As such, we are not deciding whether the religious exemption in Washington's law against discrimination (WLAD) is constitutional, nor are we

> deciding whether WLAD's provisions impose liability on individuals who acted on a religious organization's behalf. **Nor are we determining what, if any, limitations are imposed on a *lay* plaintiff who seeks to sue a church or church authorities**."[6]

Respondents improperly analyze and rely on Elvig to support their position. First, the Elvig decision specifically excluded cases where a lay plaintiff brings an employment claim against a religious organization. The plain text of the decision confirms this. Here, there was no determination that Mrs. Erdman was a minister of the Church. The trial court specifically held on the record that it did not have sufficient information to make the decision. Even so and as will be discussed below in more detail, the facts in this case will illustrate that Mrs. Erdman was not a minister. Respondents are relying on portions of the Elvig decision that do not apply to this case and contaminating the analysis with references to the ministerial exception.

Second, by Amicus Brief in Elvig, the Presbyterian Church (USA) Synod of Alaska Northwest ("Presbyterian Church of Alaska") took a position contrary to the one asserted by Respondents here. In Elvig, the Presbyterian Church of Alaska specifically stated that

> "[T]he Presbytery **does not purport to have authority** to adjudicate all disputes that may implicate its clergy. Where, for example, criminal conduct has been alleged against a clergy member, the Book of Order does not substitute for the State's penal code. Similarly, the

[6] Elvig, 123 Wn. App. at 499, 98 P.3d 524.

> presbytery's adjudicatory procedures do not extend to claims brought by lay employees against clergy or the religious institutions they represent."[7]

Finally, Elvig cannot be relied upon to affirm the trial court's decision on the basis that Mrs. Erdman's claims were previously decided questions of ecclesiastical law, rule, or custom because no such decisions were made. This was confirmed during the investigation by Presbytery investigation chair, Rev. Schmick, when he testified that Mrs. Erdman's claim of discrimination under Title VII was a civil issue, not an issue dealing with scripture.[8] Elvig requires a determination by the trial court that the issues raised in the secular lawsuit necessitate the interpretation of church doctrine or religious beliefs; however, the trial court in this case conducted no analysis. The trial court provided Respondents with a blanket protection with no regard to the specific facts of the case.

B. The Ministerial Exception is Not Applicable Here

1. The Trial Court's Determination on Summary Judgment did Not Include Analysis of the Ministerial Exception

The trial court did not make a determination concerning the application of the ministerial exception, and confirmed that it did not have sufficient facts to make such a determination at the summary judgment hearing. The trial court specifically held, "I don't believe that I at this time

[7] Elvig, 123 Wn. App. 491, 98 P.3d 524, Amicus Brief of Presbyterian Church (USA) Synod of Alaska Northwest p.19 *available at* http://www.pcusa.org/acl/amicus/am49.pdf.
[8] CP 653-54.

have enough facts to determine that she [Mrs. Erdman] is a minister." RP 4. The trial court did not rely on the exception in dismissing Mrs. Erdman's causes of action.

Respondents' reliance on Graff v. Allstate Ins. Co.[9] is misplaced. The Gafff decision restates the law concerning an appellate court's scope when reviewing a summary judgment. Here, the trial court clearly stated that there were insufficient facts in the record to permit a determination on the application of the ministerial exception, and that a hearing on the issue at a later date would be required. Respondents are now requesting this Court use the same record to do what the trial court indicated that it could not. The trial court's determination on this issue should not be disturbed.

2. *The Facts in this Case Support a Finding that the Ministerial Exception Does Not Apply*

A review of the record demonstrates that application of the ministerial exception is not applicable here.

Mrs. Erdman was not hired by the Church as an employee to serve the Church's spiritual and pastoral mission. The application of the "ministerial exception" depends upon the **function** of the position. Mrs. Erdman's primary duties **did not** consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship. Mrs. Erdman was essentially the CFO (Chief

[9] 113 Wn. App. 799, 54 P.3d 1266 (2002)

Financial Officer) of the Church, completed work tasks consistent with her finance/accounting background, and was not a member of the 'clergy'.

The "ministerial exception" is a constitutionally-derived exception to civil rights legislation that "insulates a religious organization's employment decisions regarding its ministers from judicial scrutiny."[10] It applies "when the disputed employment practices involve a church's freedom to choose its ministers or to practice its beliefs." Id. The facts in the instant matter will demonstrate that the ministerial exception does not apply to this case.

For instance, the Church's Handbook (Volunteering in Church Related Ministries), states the following:

> "We believe that all Christians, as members of the body of Christ, are called to serve (minister) in a variety of ways according to their gifts, passions and abilities. Such service is voluntary (nonpaid) participation as a church member, and is not part of the regular employment responsibilities.[11]

Ms. Erdman was ordained as an Elder in May 2003.[12] Upon ordination, Ms. Erdman became a member of the Session (Church's governing body), and served in a voluntary capacity until seeking regular paid employment. Id.

In March 2005, the Executive for Stewardship position was created with the purpose of providing financial stability for the Church.[13] The job

---

[10] Elvig, 123 Wn. App. at 497, 98 P.3d 524.
[11] CP 307.
[12] CP 307.
[13] CP 308.

duties of the position were specific - the Executive for Stewardship was to reduce the level of debt, improve tithing levels, increase finance competence, manage the Accounting Manager, manage financial planning, and develop a database. Id. Ms. Erdman was the first Executive for Stewardship for the Church. Id. The Executive for Stewardship position did not require the candidate to be an elder or even a member of the Church. Id. Upon obtaining the position of Executive for Stewardship, Ms. Erdman resigned from the Session. Id.

Controversies touching the relationship between **a church and its minister** are normally avoided by secular courts because the "introduction of government standards to the **selection of spiritual leaders** would significantly, and perniciously, rearrange the relationship between church and state."[14] Because the minister is the chief instrument by which the church seeks to fulfill its purpose, matters touching upon the minister's salary, place of assignment, and duties to be performed are not reviewable by a secular court.[15]

Secular courts will, however, hear contract and employment cases arising from a church controversy when no ecclesiastical or doctrinal issues

[14] Gates, 103 Wn. App. 160, 166, 10 P.3d 435; Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (Court dismissed a discrimination claim brought by an associate pastor after determining that the position was important to the spiritual and pastoral mission of the church).

[15] Gates, 103 Wn. App. at 166; McClure v. Salvation Army, 460 F.2d 553, 558-59 (5th Cir. 1972).

are involved.[16] Because the frontier between church doctrine and civil contract law is a sensitive area, a court must determine whether the specific facts of the case present a threat of religious liberty.[17] In Umberger v. Johns[18], the court held that civil courts may apply and enforce principles of parliamentary procedure, and in Eisenberg v. Fauer[19], the court determined it had jurisdiction over religious corporations where matters not of an ecclesiastical nature were involved.

Applicable to the present case, Respondents rely on Gates to assert that the ministerial exception applies not just too ordained clergy, but to **all employees** of a religious institution regardless of whether or not the **primary functions** of the employee is to serve the church's spiritual and pastoral mission.[20] The application of the "ministerial exception" depends upon the function of the position.[21] "As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy'."[22] This approach

---

[16] Mason, 49 Wn. App. at 445-46, 743 P.2d 848; *see also* Minker v. Baltimore Annual Conf. of United Methodist Church, 894 F.2d 1354, 1359-61 (D.C.Cir. 1990).
[17] *See* Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360, 363 n. 3 (8th Cir. 1991); Smith v. Riley, 424 So.2d 1166 (La.Ct.App. 1982); Wilkerson v. Battiste, 393 So.2d 195 (La.Ct.App. 1980).
[18] 363 So.2d 63 (Fla.Dist.Ct.App. 1978).
[19] 25 Misc.2d 98, 200 N.Y.S.2d 749 (1960).
[20] *See* Gates, 103 Wn. App. at 166; Rayburn, 772 F.2d at 1168.
[21] Rayburn, 772 F.2d at 1169; *citing* EEOC v. Southwestern Baptist Seminary, 651 F.2d 277 (5th Cir. 1981).
[22] Id.; *citing* Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 Columbia L.Rev. 1514, 1545 (1979).

necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church.[23]

The facts in Rayburn distinguish it from the instant matter, and support the conclusion that the ministerial exception does not apply. In Rayburn, plaintiff Carole Rayburn was a white female member of the Seventh-day Adventist Church who held a Master of Divinity degree from Andrews University, the church's theological seminary, and a Ph.D. in psychology from Catholic University.[24] In 1979, she applied for an Associate in Pastoral Care internship, as well as for a vacancy on the pastoral staff of the Sligo Seventh-day Adventist Church. Id. Upon learning of her rejection, Rayburn filed a complaint with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, alleging discrimination on the basis of her sex, her association with black persons, her membership in black-oriented religious organizations, and her opposition to practices made unlawful by Title VII. Id.

In Rayburn, discovery focused on the **nature** of an associateship in pastoral care.[25] Undisputed evidence showed that the Sligo Church position entailed teaching baptismal and Bible classes, pastoring the singles group, occasional preaching at Sligo and other churches, and other evangelical, liturgical, and counseling responsibilities. Id. An associate in pastoral care

[23] Id.; *see* Southwestern Seminary, 651 F.2d at 283.
[24] 772 F.2d at 1165.
[25] 772 F.2d at 1165.

may also receive a "commissioned minister credential" or a "commissioned minister license." Such facts are not present in the instant matter.

Further, the facts in Fontana v. Diocese of Yakima,[26] are also distinguishable from the current matter. In Fontana, the Diocese hired Mr. Fontana as director of evangelization. Id. Evangelism by its very term means preaching the gospel. Id. A job description statement articulated after Mr. Fontana was hired, but during his employment, stated that his job entailed development and implementation of "evangelization adult formation programs in Christian discipleship, Scripture, the Catholic Faith as summarized in the Creed, Sacraments, Liturgy, Morality, Spirituality, Evangelization and Social Justice with the goal of preparing every Catholic for ministry in the Church and mission in society." Id. The Diocese asserted that Mr. Fontana's job "was directly related to the teaching of the Catholic Faith and doctrine." Id.

In the instant matter, the ministerial exception does not apply in light of the duties/obligations/responsibilities related to the position held by Mrs. Erdman. In Rayburn and Fontana there were undisputed facts that placed the plaintiffs squarely in the definition of "clergy" / "minister," and as a result, the courts determined that the exception applied.

Mrs. Erdman's job duties place her outside the application of the exception. Ms. Erdman's primary duties **did not** consist of teaching,

[26] 138 Wn. App. 421, 426-27, 157 P.3d 443 (2007).

spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship -- It is significant to note that Respondents **do not seek to assert** Mrs. Erdman performed these duties. However, Respondents do direct the Court to Mrs. Erdman's 2006 Evaluation, and attempt to argue that it supports their position that Mrs. Erdman was a minister – this assertion is merely legal legerdemain.[27] In fact, a close review of Toone's comments reveals more fully Mrs. Erdman's job responsibilities and Toone's discriminatory behavior.[28]

Mrs. Erdman was not a member of the "clergy" or a "minister" consistent with the definition stated. Here, Mrs. Erdman's primary duties involved developing and managing the 5 million dollar annual budget of the Church.[29] Her position and job responsibilities were akin to that of a CFO, and primarily were but were not limited to the following tasks:

- Manage accounting/finance team (Accounting Manager, Accounting Assistance, Accounts Receivable volunteer, Financial Planning Analyst, and Database administrator);
- Department was responsible for all accounting, payroll, tax, pricing, and banking functions;
- Provide business case analysis for all special events and all food service venue;
- Ensure accuracy of all accounting records including reconciliation/resolution of all balance sheet accounts;

[27] *See* Respondents' Brief p. 36.
[28] CP 928.
[29] CP 308.

- Manage annual CPA review process;
- Monthly review of financial results to the Sessions and annual review with the congregation;
- Member of committees for special studies on salary comps and staff benefit redesign; including providing financial impact analysis;
- Quarterly and Annual income statement review/reporting for Bank of America per debt conditions;
- Negotiate $9,000,000 of debt financing with Bank of America;
- Program manager for foundation board, including finalizing bylaws, organize Estate Planning seminars, guide Sessions in establishment of operating policies; and
- Business manger for annual youth fundraising auction (2005, 2006), including management of donation solicitation, live auction program, donor packets, registration and banking.[30]

Respondents' blanket statement that Mrs. Erdman's position was to "serve the Church's spiritual and pastoral mission," fails to actually look at what Mrs. Erdman actually did at the Church. The primary basis for having the ministerial exception is to insulates a religious organization's employment decisions regarding its ministers from judicial scrutiny -- as such, a court must determine whether the specific facts of the case present a threat of religious liberty. No such facts exist in this case. The ministerial exception does not apply.

Mrs. Erdman is not a minister in the eyes of the Church or for Federal

[30] CP 308.

tax purposes.[31] Ms. Erdman is not authorized to administer sacraments, never had the responsibility of conducting religious service/worship, and did not receive any of the tax benefits/considerations available to ministers. Id. Ministers at the Church receive a pastor discretionary expense allowance, book allowance, study allowance, four weeks vacation, two weeks study leave time, and 12 weeks of sabbatical every seven years -- Mrs. Erdman did not receive any of these special considerations. Id. Mrs. Erdman was also not included in the regular pastor planning meetings. Id.

Mrs. Erdman was an employee hired by the Church to perform specific tasks related to finances and accounting.[32] While Mrs. Erdman performed work for the benefit of the Church, this is no different from the work performed by any employee on behalf of her employer (i.e., Starbuck's CFO on behalf of and for the benefit of the company).

This Court should find that based on the nature and actual work performed by Mrs. Erdman, the ministerial exception does not apply.

C. The WLAD is Unconstitutional

1. Mrs. Erdman's Constitutional Challenge of RCW 49.60.040(3) on the basis of Article I, § 12 is an Issue of First Impression

RCW 49.60.040(3) violates the State's privileges and immunities clause, Constitution article I, § 12, because it confers an unequal privilege

[31] CP 309.
[32] CP 309.

to a minority class -- religious organizations. Specifically, it allows religious organizations to discriminate in violation of a fundamental right and contrary to protections of RCW chapter 49.60.

Respondents reliance on Farnam v. CRISTA Ministries,[33] is misguided because the court plainly stated there was no determination on the plaintiff's state and federal constitutional claims with respect to the WLAD.

Similarly, Respondents reference City of Tacoma v. Franciscan Foundation,[34] when there was no decision as to the constitutionality of RCW 49.60.040(3). In City of Tacoma, the City attempted to justify its ordinance by asserting that the state anti-discrimination law does not grant religious nonprofit groups a "license to discriminate." Id. The court reasoned that although the state anti-discrimination law does not "authorize" religious groups to discriminate, it does "authorize" their exemption from the law's reach.[35] The court ultimately decided that the City's ordinance contravened First Amendment protections; however, no constitutional analysis and/or challenge was conducted.

Finally, Respondents' citation to MacDonald v. Grace Church Seattle,[36] is disingenuous. The court in MacDonald specifically held

---

[33] 116 Wn.2d 659, 681, 807 P.2d 830 (1991).
[34] 94 Wn. App. 663, 669, 972 P.2d 566 (1999).
[35] Id. at 670.
[36] 457 F.3d 1079 (9th Cir. 2006).

"[W]e **decline** to consider the constitutionality of the non-profit religious organization exemption set forth in the Washington Law Against Discrimination for "employers" discriminating on the basis of sex."[37]

In short, none of the case law presented by Respondents resolves the issue of whether RCW 49.60.040(3) violates Article I, § 12 because it provides religious organizations the right to discriminate against their employees for **any** reason. The plain language of the statute provides religious organizations an unequal privilege and immunity.

The privilege and immunity granted to religious organizations via RCW 49.60.040(3) is in violation of Ms. Erdman's, as well as all Washington State employees who are protected by the WLAD, fundamental right to pursue a common occupation free from unreasonable government interference. RCW 49.60.040(3) must be invalidated.

2. Strict Scrutiny Applies

Respondents failed to address Mrs. Erdman's position that strict scrutiny applies because she possesses a fundimental right to pursue a common occupation free from unreasonable government interference. Respondents' conclusory assertion that the rational basis test applies is unsupported and contains no analysis on this issue. Even more, Respondents' argument that RCW 49.60.040(3) would survive rational basis review because it protects a potential violation of a religious

[37] Id. at 1086.

organization's First Amendment rights is unconvincing.

Respondents' argument that without the exemption in the WLAD "a Catholic church to employee female priests" is completely absurd.[38] The federal statute equivalent of RCW 49.60.040(3) is 42 U.S.C. § 2000e-1. However, 42 U.S.C. § 2000e-1 **only** exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion. As opposed to RCW 49.60.040(3) that provides religious organizations the ability to discriminate on **any** grounds.

Mrs. Erdman demonstrated that she has a fundamental right to pursue a common occupation free from unreasonable government interference. In fact, Ms. Erdman not only has a constitutional right but **a fundamental right** to pursue a common occupation free from unreasonable government interference.[39]

RCW 49.60.040(3) provides religious organizations the ability to discriminate on **any** grounds. The statute is not narrowly construed to protect a religious organization's First Amendment protections. Rather, it is overly broad in its effect, and cannot survive strict scrutiny review.

---

[38] *See* Respondents' Brief pp. 42-43. Respondents' position is even more troubling in light of the fact that they later rely on 42 U.S.C. § 2000e-1 to support their position that Mrs. Erdman's claim for religious discrimination cannot survive.

[39] Supreme Court of N.H. v. Piper, 470 U.S. 274, 280 n. 9, 285, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985); Duranceau v. City of Tacoma, 27 Wn. App. 777, 620 P.2d 533 (1980); Grant Cy. Fire Prot. Dist. v. Moses Lake, 150 Wn.2d 791, 813, 83 P.3d 419 (2004).

3. *The Discriminatory Section of the WLAD is Severable*

The matter solely relied upon by Respondents, Mt. Hood Beverage Co. v. Constellation Brands, Inc.,[40] held that a statute is not necessarily unconstitutional in its entirety because one or more of its provisions is unconstitutional. If the remainder of the statute "can serve its purpose independently" after the unconstitutional clause is removed, severance is appropriate.[41] Provisions of a statute are not severable, however, if the constitutional and unconstitutional provisions are so connected that the legislature would not have passed one without the other, or that the remainder of the statute is useless to accomplish the legislative purpose.[42]

Here, RCW 49.60.040(3), the portion of the WLAD that is challenged, provides religious organizations the ability to discriminate on **any** grounds. This portion of the statute could be severed without impacting the remainder of the WLAD. The express Legislative intent providing Washington State individuals protective rights can serve its purpose independently.

4. *Notice to the Attorney General was Not Required*

RCW 7.24.110 states that [I]n any proceeding which involves the validity of a **municipal ordinance or franchise**, such municipality shall be made a party, and shall be entitled to be heard, and if the statute,

---

[40] 149 Wn.2d 98, 118, 63 P.3d 779 (2003).
[41] Id.; *see* State v. Williams, 144 Wn.2d 197, 213, 26 P.3d 890 (2001).
[42] Id.; Leonard v. City of Spokane, 127 Wn.2d 194, 201, 897 P.2d 358 (1995).

ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard." (emphasis added).

Here, Mrs. Erdman did not bring an action challenging the validity of a municipal ordinance or franchise or even under the Uniform Declaratory Judgments Act for that matter; therefore, notice to the Attorney General was not required.

D. It was an Error for the Trial Court to Rely on Withheld Documents

Respondents did not attempt to offer a response to Mrs. Erdman's position that the trial court's decision on summary judgment in reliance on documents withheld from production following an *in camera* review was in error. The trial court's reliance on documents that Mrs. Erdman never had an opportunity to review and/or respond to is reversible error, and requires that this case be remanded.

E. Mrs. Erdman Should have had the Opportunity to Conduct Discovery

Conducting discovery does **not** offend the protections of the First Amendment and does **not** entangle secular courts with the decisions of an ecclesiastical tribunal. More specifically, issues pertaining to (1) Mrs. Erdman's right to subpoena the Presbytery when it possess responsive documents or take the deposition of a relevant witness and (2) the decision of an ecclesiastical tribunal pertaining to religious matters are separate and

distinct.

Reiterating the trial court's order pertaining to Mrs. Erdman's motion to compel does not justify the trial court's misapplication of the test articulated in Snedigar.[43] Respondents fail to respond to Mrs. Erdman's position that the application of the Snedigar test was in error because, at the time the motion to compel was filed, the Presbytery **did not** have a qualified First Amendment associational privilege. Nor did Respondents respond to Mrs. Erdman's argument that even if the Snediger test applied, she met her burden. Finally, the case law relied upon by Respondents does not support the trial court's decisions limiting Ms. Erdman's ability to fully develop her opposition to Respondents' motion for summary judgment because relevant documents were not produced[44] and the deposition of Rev. Schmick was limited in scope.

Respondents' rely on Milivojevich;[45] however, in that case the court held that the First Amendment barred a state court from invalidating as arbitrary the decision of an ecclesiastical tribunal when selecting its ministers. The court's decision has nothing to do with seeking discovery, and Respondents' attempted to liken the two separate and distinct issues is erroneous.

---

[43] Snedigar v. Hoddersen, 114 Wn.2d 153, 786 P.2d 781 (1990).
[44] Respondents state that only seven documents were withheld and provide a citation of CP 130; however, Mrs. Erdman was not aware of the number of documents withheld and the citation provided by Respondents does not support the contention that only seven were withheld.
[45] 426 U.S. 696, 712, 96 S.Ct. 2372, 49 L.Ed.2d 151.

First, reliance on N.L.R.B. v. Catholic Bishop of Chicago,[46] is misplaced and attenuated. In Catholic Bishop, the National Labor Relations Board concluded that schools operated by church had violated National Labor Relations Act by refusing to recognize or to bargain with unions representing lay faculty members at the schools. The church fought this administrative decision. Such issues of control and the level of intrusion are not present in this case. Mrs. Erdman sought discovery, not any type of determination or interpretation related to religious doctrine.

Second, the holding in E.E.O.C. v. Catholic University of America,[47] is equally unsupportive of Respondents' position. In Catholic University, the court held that an excessive entanglement may occur where there is a sufficiently intrusive investigation by a government entity into a church's employment of its clergy -- there is no issue before this Court related to Presbytery's employment practices. In fact, Catholic University involved the EEOC's two-year investigation of Sister McDonough's claim, together with the extensive pre-trial inquiries and the trial itself. The court determined that the two-year investigation and related pre-trial inquiries constituted and impermissible entanglement with judgments that fell within the exclusive province of the Department of Canon Law as a pontifical institution. Again, the facts in the instant matter are completely unrelated to the determination in

[46] 440 U.S. 490, 99 S.Ct. 1313 (1979)
[47] 83 F.3d 455(C.A.D.C. 1996)

Catholic University.

Finally, Defendants' reliance on Bell v. Presbyterian Church (U.S.A.),[48] does not assist in the resolution of the issue before the Court. In Bell, the issue before the court was whether secular courts must defer to decisions of religious organizations on decisions about **appointment and removal of ministers**, this is not relevant to the analysis of whether the Presbytery should have been compelled to produce documents pursuant to a valid subpoena. Again, Respondents are seeking to rely on case law not related to the issue before the Court.

Religious organizations are not immune from discovery, and the decisions limiting a trial court's jurisdiction only occur when the legal claims presented require a secular court to interpret or weigh church doctrine -- these issues were not before the trial court, yet it based its denial of Ms. Erdman's motion to compel and limited her ability to conduct a deposition on the same.

II. CONCLUSION

The trial court failed to properly interpret a religious organization's the First Amendment privileges, and limited Mrs. Erdman's ability to fully respond to Respondent's motion for summary judgment. For the above reasons this case should be reversed and remanded. In addition, Ms. Erdman requests that the Court find RCW 49.60.040(3) unconstitutional.

[48] 126 F.3d 328 (4th Cir. 1997).

Respectfully submitted this 25 day of November, 2009.

Robin Williams Phillips, WSBA No. 17947
Sean V. Small, WSBA No. 37018
Attorneys for Plaintiff/Appellant
LASHER HOLZAPFEL
SPERRY & EBBERSON, P.L.L.C.
601 Union St., Suite 2600
Seattle, WA 98101
(206) 624-1230

DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that on November 25, 2009, I caused a copy of this document to be served upon the following:

Supreme Court of the State of Washington 415 – 12th Ave. SW PO Box 40929 Olympia, WA 98504 (360) 357-2077 supreme@courts.wa.gov	☒ Legal Messenger ☐ By Mail ☐ By Facsimile ☐ By E-Mail ☐ By Federal Express
William A. Coats, WSBA #4608 VANDEBERG JOHNSON & GANDARA, LLP 1201 Pacific Avenue, Suite 1900 PO Box 1315 Tacoma, WA 98401-1315 (253) 383-3791 (253) 383-6377 (fax) wcoats@vjglaw.com, dmontopoli@vjglaw.com, and mregimbal@vjglaw.com ***Attorneys for Defendants***	☒ Legal Messenger ☐ By Mail ☐ By Facsimile ☐ By E-Mail ☐ By Federal Express

Bryan D. Johnson
Legal Assistant to Sean V. Small